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THE "POOL" AND THE "TRUST."*

A REVIEW OF THE UNITED STATES SUPREME COURT'S TRAFFIC DECISION (U. S. v. TRANS-MISSOURI FREIGHT ASSOCIATION).

[*Continued from July Number.*]

RESTRAINTS UPON TRADE BY ONE.

In view of the decision of the Supreme Court of the United States on March 22, 1897, in the case of the *United States* v. *Trans-Missouri Freight Association*, it remains now to say a word upon the special case of contracts alleged to be in restraint of trade.

There is no head in the law that has involved a greater contrariety of decision than this. A glance at the opinion of Lord Macnaghten in the Nordenfeld case (App. Cas. 1894, p. 563) will show how the judges have differed from each other upon questions of this sort, and how one has criticised and almost abused another.

Finally the subject came under the review of the House of Lords of Great Britain in 1894, in the case of *Nordenfeld* v. *Maxim Company* (App. Cas., 1894, p. 535), and, after elaborate review of it, the doctrine was announced that in cases like that before the court, the test of whether the contract was one in restraint of trade or whether it was not, was whether the restraint was a reasonable or an unreasonable one, and, in the argument of the Trans-Missouri Freight Association case, following the Nordenfeld case, the whole question made before the Supreme Court was whether the agreement in that case was one that put a reasonable or an unreasonable restraint upon trade, and the whole question considered by the court was whether or not it was to be bound by that test.

The facts of the Nordenfeld case were these: Nordenfeld, the inventor of the celebrated quick-firing gun of his name, sold out all his

rights to the Maxim Company, and agreed with it that for twenty-five years from date he would not engage in a rival business anywhere in the world. He received large compensation for his rights. Afterwards, having spent what was paid him (as is to be inferred, since he argued his own case in the House of Lords under the designation of a pauper), he undertook to violate his contract and start a rival business. The Maxim Company applied to the courts to restrain and enjoin him and compel him to abide by his agreement. Nordenfeld claimed that as his contract bound him not to engage in a rival business anywhere in the world it was one in restraint of trade under the old rule that allowed a man to contract not to carry on a business within a limited space, but forbade him to contract generally that he would not carry on a business anywhere. After an elaborate review of the subject the judges resolved to abandon the old idea depending upon locality, and they declared the rule to depend upon whether the restraint put upon trade was reasonable or unreasonable.

Now, it is clear that the whole scope of that case has relation to the right of one man to put himself under a servitude. Every man in England and America is a freeman, and the whole idea and policy of the institutions of both countries are that men shall remain freemen as long as it is possible for them to be so. The citizen must, of course, be permitted to part with some portion of his freedom or he could not enter into the contract obligations which are essential to civilization and commerce. But the law will not countenance his subjecting himself to what is practical slavery. It will allow him to part with so much of his freedom as is necessary for the demands of trade and commerce, but will not allow him to part with more than that. When he undertakes to part with more than that the law says he is simply making himself a slave, wantonly, and without any scund reason for it.

This, I submit, is the whole scope and meaning of the Nordenfeld case, and when the judges talk of "reasonable" and "unreasonable," it is with reference to this foundation idea.

Lord Macnaghten, in delivering his opinion, said:

"There is no higher authority upon the subject, 'contracts in restraint of trade,' than Tindal, C. J. He had more to do with moulding the law on this head and bringing it into harmony with common sense than all the judges since Lord Macclesfield's time put together. You will hardly find any judgment in reference to restraint of trade delivered by any court in England or America during the last six years in which some passage is not cited from some judgment of Tindal, C. J." Ib. 569).

In the case of *Horner* v. *Graves*, 7. Bing. 735–743, Chief Justice

Tindal thus describes the test of a contract that is in restraint of trade:

"We do not see how a better test can be applied to the question, whether unreasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive, and, if oppressive, it is, in the eye of the law, unreasonable."

This is quoted with approbation by the Lord Chancellor in the Nordenfeld case, and is accepted as the correct exposition of the law by the other judges. It is the hinge upon which the Nordenfeld case turns.

This, then, is all that the Nordenfeld case establishes, to-wit: that if a person binds himself to do what cannot be of benefit to the covenantee and is simply oppressive to the covenantor, then the covenantor shall be held to have parted with more of his freedom as a citizen than there was any occasion for, and he shall not be held bound by the part of the contract that is simply oppressive to him though bound by that part which gives the covenantee a benefit and is not needlessly oppressive to the covenantor.

It is true the "interests of the public" and the "rights of the public" and "public policy" are phrases that occur throughout the opinions of all the judges in this case. But we must understand those phrases as relating to the case that was actually before the court. The judges had before their minds the question how far a man might part with his freedom as a free man by contract, and, when they speak of "the public" and "public policy," they refer to the public policy that is interested in every man remaining a free man and not converting himself into a slave. They were dealing with that question under the name of a "contract in restraint of trade."

There is one other idea connected with the subject that should also be noticed. There was undoubtedly a notion in old times that the public had an interest in preventing a man making a contract that would disable him to perform his part in the labors required by society of its citizens, because, if one man could so disable himself, all others might do the same, and society might thereby be deprived of so many laborers that men would starve or freeze. But modern thought discards this along with many of the other old-time and false notions of political economy.

The supply must always equal the demand, if there is any source of supply which can meet demand. If such a thing could happen as that so many men disabled themselves by contract not to labor as to endanger the necessary supplies for men, then it would at once become more to the interest of those who controlled the laborers to allow them to labor than to keep them from laboring. They would be offered such remunerative prices for allowing their covenantees to labor that they would find it to their interest to allow them to labor. Society might have to pay a high price for what it needed, but that would only be the usual case of provident men getting advantage of their foresight, and improvident men having to pay for their inaptitude. Society would run no risk, though some short-sighted men might have to pay very roundly for what they needed. It is entirely in order to quote again here what Lord Watson said upon this point in the Nordenfeld case. (Ib. 552). He said:

"It must not be forgotten that the community has a material interest in maintaining the rules of fair dealing between man and man. It suffers far greater injury from the infraction of these rules than from contracts in restraint of trade."

These are words fit to be written in letters of gold in every tribunal of justice or other public place.

CASE WHERE "REASONABLE" IS REALLY THE TEST.

This analysis and explanation of the Nordenfeld case has been a little prolonged, but it has seemed necessary in view of the fact that the whole discussion there turned upon the phrase "contracts in restraint of trade," and, as "reasonable" or "unreasonable" was made the test there, it would seem to have established that "contracts in restraint of trade" were to be subjected to that test and not to the test of malice or good intention.

But when the Nordenfeld case is critically examined it becomes clear that everything said in it has reference to the case of one man putting himself under a servitude by his contract, and that the test of "reasonable" or "unreasonable" has relation to that case alone. It was not intended by the judges in that case to intimate that that test had any relation whatever to a case in which several men have agreed together to do a thing in concert.

It must be manifest that a case in which a pauper who has squandered what he has received for agreeing not to do a thing, endeavors to free himself from the obligations of his contract, stands upon a very different footing from a case in which the sovereign charges that a num-

ber of its citizens have conspired and agreed together to form themselves into a combination to do an injury to their fellow-citizens, and that they are actually carrying their agreement into effect, to the great injury and loss of the others. The first case stands upon considerations that relate wholly to the ability of the citizen to part with his liberty as a free man. The second stands upon considerations that relate to the right of numbers to combine together against one. So manifestly do the cases separate from each other that the Mogul steamship case was not even referred to in the Nordenfeld case. The Nordenfeld case gives the law where one man put himself under a servitude, and seeks to escape his obligations. The Mogul steamship case solves the great social problem of how far men dwelling together under the restraints of society, may co-operate together when the consequence of their co-operation may be the destruction of some of their fellow-citizens.

It comes down then to this, that there never was a day when the elementary principles of our laws regarded any agreement between men as a "contract in restraint of trade," if the parties to the agreement were seeking their own good only and had no malice or ill-will towards any others; and that for a contract to have been one in "restraint of trade," according to the legal idea of "restraint of trade," the parties to it must have been animated by a malicious purpose to do another an injury from ill-will towards him.

THE BOYCOTT.

A few words should now be addressed especially to the boycott. So far this essay has treated the subject as though malice was the only element that could cause the actions of men to be condemned as vicious. That was because the character of action most liable to be called in question is action to which malice only can be attributed as a ground for viciousness. But the actions of individual man or of men acting in concert may, of course, be called in question upon many other grounds. There may be attempts to coerce by force, or attempts to intimidate by threats of force, or actual trespasses. Any of these would make the action of a combination bad just as well as malice. So there may be actual malice, or there may be a state of facts which warrants imputation of malice, although none may exist. The vice in a boycott may arise from any one of these causes. It may be an attempt to coerce by force, or by threats of force, or it may be an actual trespass, or it may be actuated by malice, or it may present facts wanting in actual

malice, but of such a character that the law will impute malice to those participating in it.

A great case arose in Virginia a few years back which went to the Supreme Court of Appeals of the State, and is reported in the eighty-fourth volume of Virginia Reports, at page 927, under the name of *Commonwealth* v. *Crump*, that illustrates the subject fully. There was a mercantile firm of stationers and employers of printers in Richmond called B. & B., and there was a printers' union in the city called Typographical Union, No. 90. B. & B. refused to employ union printers only, and the union therefore "boycotted" the firm. They published a weekly paper called the *Labor Herald*, in which they published under the heading "Black List" the names of all persons who dealt with B. & B., and they warned all "friends of labor" against dealing with any person on this "black list." There were a number of other facts in the case which made it one that might have fallen under any one of the heads mentioned—that is, an attempt to coerce by force or by threats of force, or an attempt to ruin B. & B. from actual malice, or by acts to which the law imputes malice—or it could have been regarded as a simple case of naked trespass. It is in the last three lights that I will consider it.

The action of these parties was plainly a naked trespass upon the rights of B. & B. They were not employers of printers, but actual printers. They were not, therefore, rivals in business of B. & B. seeking to get for themselves a business that B. &. B. then had. They depended upon B. & B. in a sense. It was not the case of competitors striving for a prize that both could not enjoy and that must fall to only one of the two. It was, therefore, a simple, naked, barefaced attempt to ruin B. & B. because B. & B. would not conduct their business as the printers desired rather than as B. & B. chose. It was the case of a meddler interfering with the business of a man who had no relations of any sort whatever with him. It was a naked trespass upon the rights of B. & B., differing in no way in principle from an invasion of their premises and the breaking up of one of their presses. That was clearly one head of illegality under which this "boycott" fell.

But it might also have been held to fall under the head of a combination to ruin B. & B. because of actual malice. The facts of the case justified the conclusion that men who would injure another by such a barefaced trespass as this entertained ill-will and malicious feelings for that other. Or it might have fallen into the class of cases in which the law imputes malice, whether any exists or not. If a man reck-

lessly fires a gun into a crowd and kills another, the law will not allow him to say he entertained no ill-will towards the man he killed. It imputes malice to any man capable of such a wicked and reckless act. So the law would say to those boycotters: "It is vain for you to come forward saying you have no ill-will to B. & B.; you are seeking to ruin them, not as a competitor in business, but as a naked trespasser upon their rights, and I will hold that you are animated by the only feeling which could possibly prompt such action."

THE SUBJECT AS RELATED TO AMERICAN INSTITUTIONS.

We have now taken a view of the elementary and foundation principles of our laws as they are related to this subject, and of their growth and development in being applied to changing conditions in England. It is next in order to take a glance at them as related especially to the institutions of this country.

The English grew up to the state of the law declared by the Mogul steamship case. But we started out, in this country, upon that as the basis of our institutions. Thomas Jefferson had more to do with shaping and coloring our institutions than all the other statesmen of a hundred years back put together. We are not left in doubt about what he thought of these questions. When he came to die he wrote in his will that he wished his monument to tell mankind in all ages, and only that, that he was the author of the Virginia statute of religious freedom, the author of the Declaration of Independence, and the founder of the University of Virginia, where the doctrines of those two instruments were to be taught. When we look to the Virginia statute of religious freedom we find it opening with these solemn and impressive words:

"Whereas Almighty God hath created the mind free."

When we look to the Declaration of Independence we find him writing:

"We hold these truths to be self-evident: that all men were created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness."

Mark, the right is to liberty, not license, and the pursuit of happiness—that is, the right to freely labor for one's own advancement.

Here, then, was Jefferson's philosophy. The mind was to be free, and the citizen was to be free in person to do whatever he pleased to advance himself in life so long as he did not trespass upon the rights of his fellow-citizen. That is the idea of "liberty to pursue happiness," for the essence of "liberty" is freedom restrained by law, and

"liberty to pursue happiness" was the right to do whatever suited any citizen, so that he had no malicious purpose to cause his fellow-citizen an injury in what he did.

This then was the idea with which we commenced our national life. Every citizen was to be free to think as he pleased, to express himself as he pleased, and to act as he pleased, so long as he was in good faith seeking to advance his own fortunes in life and had no sinister intentions toward his fellow-citizens. Our citizenry was to be one of free competitors, the strongest and most virile to have and enjoy whatever rewards they might secure for themselves by earnest toil, thrift, economy, and good judgment.

Right at once, and as soon as our national government was formed, our forefathers, jealous of that liberty which they had formed the Union to secure, forbade the government of the United States to interfere with these broad rights by the Fifth Amendment to the Constitution, which prohibited it from depriving any one of life, liberty, or property without due process of law. The citizen was left at the mercy of his State, in a measure, until the Fourteenth Amendment was adopted, when his fundamental rights were secured to the citizen against State action also; by the provision that forbids any State to deprive any person of life, liberty, or property without due process of law.

Are we then, at the end of the nineteenth century, going to throw away the priceless heritage we derived from our Revoluntionary forefathers and retrograde behind that state that England has grown up to, towards the conditions existing in England in 1682, that old Chamberlayne has so graphically described? It is impossible that the enlighted thought of America can permit it.

THE RELATION OF COMPETITION TO THE SUBJECT.

The next proposition demanding consideration is that the Pool or Trust suppresses competition. The allegation is founded upon the so-called aphorism that "Competition is the life of trade." While competition properly understood is necessary to healthy trade, ill-regulated competition may as well be said to be the death of trade. The survival of this saw shows how tenaciously an error may cling to the public mind in spite of the most overwhelming proofs that it is an error.

In the days of stage coaches when news was carried a paltry forty miles a day by the mounted courier, and when the heavy products of one locality could only be sent to another locality by water transportation, the freest competition was consistent with profitable trading by

all engaged in business. But, now that steam and electricity have brought all localities into direct and almost instantaneous touch, unwholesome competition is mischievous and cannot survive. These conditions have coerced those engaged in business into resorting to the Trust as one means of putting a restriction upon destructive competition.

It is now in order to consider some of the practical results brought about by the Trust.

LIMITATION OF PRODUCTION.

It is alleged against the Trust that it limits production, and thus enables those interested in it to extort higher rates than the public would otherwise have to pay. The notable point in this connection, however, is the fact that if the Trust does limit production, it nevertheless allows a sufficient production to answer every demand. It is pertinent now to ask how is the public hurt by a limitation of production, if production is left at a point which offers an abundant supply? To produce more than this is to open the door to waste and loss. It cannot be denied that the operation of the Trust has been to produce a steady and certain decline in the prices of articles controlled. A notable instance is that of the Standard Oil Company, which between 1865 and 1896 has reduced the price of refined petroleum in barrels from sixty-five to seven cents a gallon. Sugar furnishes another illustration. The average price of granulated sugar for nine years prior to the formation of the Sugar Trust was 7.90 cents per pound, while the average for nine years since the formation of the Trust was 5.27 cents per pound. In 1880 granulated sugar cost 10.31 cents per pound, wholesale price at the refinery; to-day the price at the refinery is four cents a pound. It can be absolutely affirmed that the inexorable law of the Trust is to lower prices of the articles dealt in to the lowest that will bring a reasonable profit, because the most powerful of all influences, selfishness, impels it to that course. No truth is more fully recognized than that the dealer's great rewards come from large sales at small profits rather than from small sales at large profits. Furthermore, low prices give a wider and therefore safer market.

Mr. John E. Searles touched the point of this matter in his testimony before the Lexow Committee February 8, 1897. He was asked: "Is it not a fact that, having destroyed competition, you have now reached a point when people will refuse to buy?"

He answered: "On the contrary, the policy of the American Su-

gar Refineries Company is, and has been since its organization, to furnish sugar to the consumer at the lowest possible price, not for philanthropic reasons, but because it is good business."

Although not entirely pertinent it is just as well to meet here the laborer's fear that the closing of productive plants by the Trust will inure to his disadvantage by diminishing the number of employing agencies. Instead of dimishing, the Trust multiplies the number of employing agencies indefinitively. By cheapening everything it increases the demand. And again, when the Trust reduces the price of one article it leaves the consumer money with which to purchase others, and consequently manufactories must be established to supply this demand.

For instance, when oil was sixty-five cents a gallon and sugar ten cents a pound, a dollar would buy a laboring man, we will suppose, a gallon of oil and three and a half pounds of sugar, and these would last him a week. But now he can buy his week's supply of oil and sugar for twenty-one cents (a gallon of oil and three and a half pounds of sugar), which leaves him seventy-nine cents of the dollar over for other purposes. Men's desires increase as they have the means of gratifying them. This laboring man and his family never wore gloves to church on Sunday, we will suppose. But, seeing their neighbors, who were better off, wearing gloves on Sunday, they naturally desired to do the same. Having this much over of their dollar, they bought gloves with it. Now, new glove factories must be erected to supply this new demand for gloves, and these employ additional laborers, and so the thing goes on. The Trust cheapens the price of products to consumers. This gives them the means of gratifying a greater variety of tastes. As they call for new articles new industries must be started to furnish them, and these new industries must employ new laborers. The thing is automatic. All that is needed is to leave natural laws to their appropriate work, and everything will come down in price and employment for everybody will consequently increase.

This is plainly the economic law of the case, as every one must admit who reflects upon the greater comforts that the poorest man now has. The mechanic now has many comforts in life that Louis XIV., in all his pride and power, was utterly unable to obtain. I saw in my own house recently, a rug fifteen feet long and three and a half wide, for which my wife told me she paid $2.50. Every mechanic can now have such rugs in his house. I never saw so good a rug in my father's house fifty years ago, when I was a child, though my family was con-

sidered one of the well-to-do in our region of country. We kept pleasure-carriages and horses, and the children were sent to the most expensive schools.

UNREASONABLE CHARGES BRING ON COMPETITION.

Successful business inevitably invites competition. If a Trust sells its products for an unreasonable profit it will inevitably have to contend with competition, but such competition is healthy and sound. The Wire Nail Trust is a signal instance of this. The manufacture of wire nails is very simple and cheap; the unreasonable profit of the Trust tempted the cupidity of others who opened competing factories. It bought off one after another, but the profit in the business at the Trust's prices for nails tempted others until the Trust was overthrown and the business opened to unrestrained and destructive competition.

The recent collapse of the Steel Rail Trust is another illustration. The Trust's profit of ten dollars or more a ton on steel rails tempted others. According to published reports one of the members of the Trust became its rival. He deserted his comrades, as he believed that if he could get eight or nine dollars profit he could make more than his share in the Trust profits.

The testimony before the Lexow Committee in New York in February, 1897, furnishes another illustration. The Havemeyers ascertained that the Arbuckles were making from three to four cents a pound on coffee, and at once entered into competition with them.

Mr. John E. Searles touched the point of the matter on February 8, 1897, in his testimony in New York before the Lexow Committee. On February 6th, Mr. Henry O. Havemeyer had testified that since 1894 there had been a great increase in competition in the sugar business. Mr. Searles was asked, "How much does the Sugar Refineries Company produce of that total" (1,500,000 tons)? He replied, "About 1,200,000 tons."

"Then you fix the price?"

He replied, "We fix the price only in so far as we make low prices that we may undersell our competitors."

That is it. They must always fix the price below that of their competitors to preserve their monopoly, and that price must be no more than a reasonable one, or they will always have competitors, just as other competition for them increased after 1894, owing to the impression that they were making unreasonable profits.

COMPETITION NOT THE MOST POTENT FACTOR IN DECLINE.

While fortuitous, uncertain, and often detrimental decline in prices may be observed as the immediate effect of competition, the *causa causans* of permanent decline is the endeavor by low charges to augment the traffic. It is the silent but inexorable working of the economic law that drives manufacturers and dealers to sell at the lowest possible price consistent with a profit, because they make more money by it. The law is always operating to press prices down, and however much greedy men may resist it they are forced to obey it in time. That is the real cause of prices coming down, and that cause will inevitably reduce prices to the lowest point consistent with a reasonable profit.

During the month of March, 1897, Mr. William J. Bryan argued the Nebraska maximum railroad rate case in the Supreme Court of the United States. He contended that in determining what was the highest rate a railroad should be allowed to charge, the railroad commission should ascertain what the road could be duplicated for, and should allow it to charge a rate that would make a reasonable return upon that sum of money.

One of the justices asked him if no allowance was to be made for the money spent in building the road, whether wisely or unwisely. He replied that none was to be made for that, but the test was to be, What could the road be reproduced for?

Now, I submit that neither Mr. Bryan nor the justice suggested the true principle involved in the case. The true principle upon which rates are to be adjusted is that every article is to be charged what it will bear. What it will bear is the lowest rate consistent with a reasonable profit to the road. That is the economic law of the case, and every railroad and every other business will come to be governed by it if the road or the business is left alone to adjust its charges according to the exigencies of the business, and is not interfered with by a bungling public officer executing a misconceived act of a legislature. I do not say the business will come to be governed by this principle in a day, a week, or a month. But if it is left alone it will work down to a bearing and finally come to be adjusted upon that basis. Water in the stock of the road will make no difference. The business can only make a certain return, and if rates are raised in the hope of making the return greater, the only effect will be to diminish the business. The only way the returns can be increased is to cheapen

rates and thereby increase business and build up the country along the line. This is so whether the road is overloaded with obligations or whether it is not. Obligations cannot get interest merely because they are obligations. They must get business for the road to earn interest, and business comes as rates are lowered.

The principle, then, which reduces railroad rates and the prices of all articles is the law that increases profits as prices fall.

The truth is, there is no difference in principle between the sale of transportation and the sale of groceries. Each is the sale of a commodity, and the business in each case is governed by the same laws. The grocer is forced down in the price of his groceries by the silent operation of the inexorable law that increases his profits as he cheapens his goods. The railroad is forced down in its rates by the silent operation of the same law. Both businesses are the same in principle and both are governed by the same natural law.

THE POPULISTS' IDEA OF WEALTH.

The theory of those who oppose that sort of apparent monopoly that may be acquired by a union of the resources and efforts of different individuals, is that there is a fixed quantity of wealth and other good things, and that if two or three are allowed to monopolize to themselves more than their due share of what exists, there will not be enough remaining for all the others to get what they should fairly and equitably have; but this idea proceeds upon a total misconception. There is not, and never can be, a limit upon possible wealth. Two hundred and fifty years ago there was very little wealth here except that which nature had provided in the forests, the streams, the minerals, and the herbage of the country. All the rest is the result of labor applied to the production of what man wants. The possibilities in this are without limit. If a man is turned loose to contend with nature without the aid of accumulated wealth, he is able to do little or nothing for himself. Instead of being better off in that state than when he is in a highly-organized society, where there are great accumulations of wealth, he is much worse off. In the one case he can do nothing; in the other case, if he can commend himself to the favorable notice of wealth he may secure an opportunity to do everything for himself.

The case amounts, then, to this: that however much wealth there is, there is still room for an unlimited increase of it through labor intelligently applied to the creation of what man desires. The union of men and resources reduces the price of what is produced, and thereby

increases the consumption and the production of a greater variety of articles and of new kinds of articles. These require additional laborers, so that the union of means and effort—what we call the Trust—directly tends to increase the opportunity of each individual to accumulate far beyond what it would be without that union by infinitely increasing the quantity of wealth and the employments of labor.

The philosoper of the Populists' school is always recalling to us "the good old times," forgetting that "all times, when old, are good." The Tory farmer of the Tattler was of opinion that there had been no good weather since the reign of Charles II., and some one has stated that the inhabitants of Charleston, S. C., say the moonshine is nothing like so bright now as it was before the war. But in spite of all such philosophy the world and civilization are advancing, and nowhere so rapidly as in this free country, where thought and action have so far been entirely free. Are we to return to old methods and have our progress brought to an end?

THE TRUST AS RELATED TO CORPORATIONS.

One of the most curious forms of the popular enmity to Trusts is the prevalent view of corporations. Certain existing corporations excite a great many people to a condition approaching mania. In their hatred of Trusts they confound these corporations with Trusts. They overlook the distinction between the two, and ignore the fact that the corporations thus condemned are in no respect different from any other industrial corporation.

The American Tobacco Company is an illustration. It was chartered under the laws of New Jersey, and is neither more nor less than an ordinary industrial corporation. The company was formed of several separate concerns, and purchased all the rights, property, and trade-marks of each, paying for the same with its own stock. There is no transaction known to our laws that has their sanction more entirely than this identical arrangement. Can there be suggested any ground for distinguishing between this corporation and a corporation with a capital of five thousand dollars chartered to grind sumac? If the one is a Trust so is the other. If either is to be so regarded, then it is because we choose to adopt a new nomenclature and call that which was heretofore simply a corporation by the new name of Trust. It is not that we have in any way changed the nature and character of the thing, but we choose arbitrarily to call it a Trust.

The American Tobacco Company recently required the jobber to

sign a contract pledging himself not to sell the product of any rival concern at all, and not to sell its product below a fixed price. The company has been especially attacked upon the ground that this contract makes the company's business a monopoly, and amounts to a restraint on trade. This point has already been sufficiently treated under the appropriate heading. To put limitations upon the right of this company to dispose of its own wares upon such terms as suited it best would be a tyrannical interference with the right of the citizen to do what he will with his own. An important fact in this connection was brought out in the Mogul steamship case. A shipping agent at Hankow acted as agent for the conference line and also for the Australian line. When the Australian went to Hankow for a cargo of tea, one of the conference lines notified this agent that if he loaded the Australian the conference would discharge him. This circumstance was not allowed to have any weight in the consideration of the case, several of the learned judges saying that it was an allowable method in trade. There is no difference in principle between this case and that of the American Tobacco Company in its relation to the jobber. It should be noted here that the concerns that make this contract with their customers claim that it is a matter of no moment to them ; that they do it to protect the jobbers from cut-throat competition amongst themselves.

On February 15th, Mr. Searles, the treasurer of the Sugar Refining Company, gave to the Lexow Committee the following account of the contract (one of the kind under consideration) which his company makes with the jobbers. Being asked what its object was, he said:

"I will tell you what the object is. The wholesale grocers had for years made a leader of sugar. They had sold it without any profit and without realizing sufficient to secure the cost of distribution. Sugar represented about forty per cent. of their sales, and making a loss on that left their business in a very bad condition. We had many conferences over this thing, and I took enough interest personally to go and see the wholesalers. They told me that the average cost of distribution was about five per cent.; that was twenty-one cents a hundred. They wanted an agreement with us that we would give them a quarter of a cent a pound to pay the cost of distribution. We made careful computation, and we ascertained that it would cost us 3-16ths of a cent a pound to distribute the product. That being the case, we agreed to give them this 3-16ths; in other words, through the factors' agreement, we employed them to distribute our product, and paid them exactly what it would have cost us to distribute it ourselves, with this exception, that if we had distributed it ourselves we would have had to take the risk of bad debts and all that. They take all the risks, the 3-16ths of a cent enables them to distribute our goods without cost to them, and they make their profit on the other

goods that they handle. This factors' agreement was not a proposition made by the refining company, but it was made by the wholesale grocers. It was a question of life or death to them."

The officers of the American Tobacco Company say that they make their contract with their jobbers solely for the protection of the jobbers, and that they would be glad to feel relieved from any necessity to enter into it. They say, with great force, that their goods are all standard goods that the public insists upon having. They also affirm that they have expended vast sums of money and great labor in advertising and popularizing their brands, and that it is no more than fair that they should now receive appropriate returns.

This company is not allowed by recent anti-trust laws of Georgia and Texas to make this contract with the jobbers in those States. Investigation shows that the result has not lessened the company's sales in those States, but the jobbers there complain greatly of the cut-throat competition among themselves, and there is a great outcry among them against these laws.

One of the Acts of New York, under which the prosecution of the officers of the American Tobacco Company is being made, reads as follows: "If two or more persons conspire together to commit any act injurious to the public health, to public morals, or to trade and commerce, each of them is guilty of a misdemeanor." The New York judge, before whom the case was heard, has ruled that if a jury finds that the officers of the American Tobacco Company impose the contract already described upon the jobbers with an intention thereby to threaten them and coerce them into selling their cigarettes only, they may be convicted of a conspiracy to put a restraint upon trade.

"Two or more persons" will, of course, just as well describe the members of an ordinary mercantile partnership as the officers of a corporation. Is it to be said that a mercantile partnership, manufacturing tin buckets, is not to be permitted to dictate to the jobbers who sell its product the terms upon which they may handle that product? If this is to be said, then the merchants of this country will be aroused to consciousness that a state of law exists here that they never had any idea of before. And if the law is enforced in the full length to which it may logically be carried it will probably turn out that the partners in the ordinary mercantile partnership are practically deprived of all power to conduct their business by conference and joint action, for, upon such a theory, there is hardly any partnership action that cannot be construed into a restraint of trade. If the argument which

is submitted in this essay be sound, then the officers of the American Tobacco Company have a right to reply to the New York judge that they have a right to put moral coercion upon the jobber when their whole aim and purpose is to make money, and that such coercion is not a restraint upon trade in the legal sense of that phrase. If they are animated by ill-will to the jobber, then their coercion would be a restraint upon trade.

The claim that a corporation is a Trust to be pursued by all the forces of society is, in fact, a war upon the principle of incorporation, or perhaps very rich corporations. It is either equivalent to saying that corporations have no rights that should be respected, or that very rich corporations have none. There is, of course, no ground for distinguishing between rich and poor corporations. It would be a sad day for mankind if the human race should adopt the view that men have no right to do business through incorporated companies. The great bulk of modern progress has been due to incorporated companies. This proceeds from the fact that a man can operate through them without risking more than he puts in. The prevailing idea upon this subject was strikingly illustrated by the examination before the Lexow Committee of two members of the firm of Arbuckle & Co. It appeared in the testimony that the Woolson Mills had paid a dividend the preceding year of one hundred per cent. on its actual capital. The New York *Sun's* account of the examination of witnesses says:

"The committee listened with great interest, and then Senator Lexow asked: 'Now, let me ask you, Mr. Jarvie, do you think that that is a fair business proposition? Do you think that making consumers pay 100 per cent. annually on the capital invested is fair to the consumer? Don't you think that that profit is exorbitant?

"Well, I can't answer that question. You know, according to my figures, there is only five per cent. profit, because the stock is worth a thousand dollars, and you would have to pay that much if you wanted to buy a share."

"I understand all that," said Senator Lexow, "but the investment in that company was $150,000. Now they have accumulated a surplus which makes their stocks worth the higher price. The fact is that the investment is but $150,000, and the profit is actually one hundred per cent. on that investment. In other words, the stockholders, that is the original stockholders, get back every year the total amount of money that they invested in the stock. Do you think that is fair business?"

Mr. Jarvis hesitated again. "Well," he said, "I should say that that is a very profitable business."

Senator Lexow said: "Isn't it exactly that tendency, that desire to gain money, that brings corporations to-day into bad odor?"

"Do you not think," asked Senator Lexow again, "that the attacks that are

made on corporations are due to their development on this line and the knowledge gained by the people of just this sort of thing? They make the necessity of life the subject of speculation, and secure profits that can't be made in any other line of business. Now, don't you think that this profit of one hundred per cent. per year is too large?"

"Well," said Mr. Jarvie, "judging from our business, I don't think the profits are so large as that."

"Oh, don't misunderstand me," said Senator Lexow. "I am not criticising your business at all; not at all. We are talking about this rival concern, the Woolson Spice Company. Now, tell me, doesn't the payment of any such profit show that their charges for the product is unreasonable?"

Mr. Jarvie didn't answer but he moved about uneasily.

"Tell me," said Senator Lexow, "is it proper and fair that a private corporation should pay fifty per cent. dividends and accumulate at the same time a surplus which raises the value of its stock from $100 per share to $1,000?"

"Well," said Mr. Jarvie, "I should say that it discloses extraordinary ability in the purchase of raw material."

"*Q.* How long do you carry raw material in your business? *A.* Well, we carry it sometimes in the coffee business three or four years.

"That is to say," said Senator Lexow, "you buy the coffee at a low price and you keep it until you can get a big profit on it."

"Well, we have done that sometimes."

"Now," said Senator Lexow, "if the Woolson Company had been satisfied to charge a fair commercial profit on the coffee that they handled, all the other coffee houses would have had to come down in their price to meet the competition, would they not?"

"Is not that the fact?" asked Senator Lexow again.

Still Mr. Jarvie did not answer.

"That is a great interest to get on an investment, is it not, that the coffee men have been getting?" asked Senator Lexow.

"Oh, no," said Mr. Jarvie, "they have only got a fair return."

"Do you wish it to be understood that the accumulation of a surplus ten times the original capital, and at the same time the paying of fifty per cent. dividends is nothing more than a fair profit?" asked Senator Lexow.

"No," said Mr. Jarvie, "You don't seem to understand this thing. It wasn't fifty per cent., it was five per cent., because the stock is worth that much."

"I understand your contention very well," said Senator Lexow. "But the fact is it was not fifty per cent., it was one hundred per cent. on the original investment. Do you think that was fair?"

Mr. Jarvie said: "Well, I don't want to state an opinion of a competitor in business."

It developed next that Mr. Arbuckle had not been altogether satisfied with the result of the committee's work in the morning, and he wanted to be heard again.

Senator Lexow called out, "I understand, Mr. Arbuckle, that you want to make some explanation."

Mr. Arbuckle made his way to the witness chair, and said: "Oh, yes. It was about that fifty per cent. dividend. You know your committee got the wrong im-

pression about that fifty per cent. The dividend is really only five per cent. on the market value of the stock. Don't you see? Now, another thing. I don't think that all that surplus was accumulated in the manufacture of coffee. Coffee business has ups and downs. Sometimes firms and concerns have lucky streaks, and it must have been through these lucky streaks that the Woolson people had that they ran their capital stock up to $1,500."

Q. You mean $1,500 market value? *A.* Yes, sir. Why, you don't know how coffee fluctuates. Now, I have known coffee No. 7 to be down to 5¾ cents, and it started going up, and up, and it kept going up until it was 27½ cents. Then again I have seen it start at 8 and go up to 23 cents.

Chairman Lexow listened, and when Mr. Arbuckle finished he said: "Don't you consider that this explanation of yours makes the matter worse instead of better? Do you mean to say that they add the profits of speculation to the capital stock, and then pay fifty per cent. dividends on the capital stock?"

"Oh, it's all in speculation," said Mr. Arbuckle. "Now, in the twenty years that I have been in the coffee business nineteen-twentieths of the men in it have failed. It is a speculative business. It goes up and down. Now, you know, to run a business you have got to have hundreds of thousands of bags of coffee in stock. You have got to carry a big stock. Now, when you get your coffee when it is low, and that coffee goes up on you, you see, you make a big profit; but if it goes down on you, you don't."

"Well, if it goes up on you," said Senator Lexow, "you don't give the consumers the benefit of any of the going up, do you?"

"No; you see it is a speculative business," said Mr. Arbuckle.

Now, the first thing to be noted in connection with this testimony is the fact that the coffee business is one of such ups and downs that in the twenty years Mr. Arbuckle had been in the business nineteen-twentieths of the men engaged in it had failed. Yet Mr. Lexow thought a corporation was fleecing the public because it made a very large profit in one year. But this is all by the way. The important thing is that Mr. Lexow thought, and millions of his fellow-countrymen agree with him, that it is a wrong, almost a fraud, upon mankind at large for a corporation to make immense profits in its business.

There is undoubtedly a certain prevalent jealousy of rich and successful men. But it is very questionable if that goes to any great length. The jealousy is of the successful and rich corporation. Now it is entirely in order to ask would Mr. Lexow have thought the public robbed if the Woolson mills had never taken out a charter but had remained a partnership and had made a profit of one hundred per cent. upon its capital in 1896?

The prejudice against corporations must take one of two courses if it has its way, and either of them would be most disastrous to the public. Either it must go the length of forbidding corporations entirely, which would be the same thing as putting an end to progress

and starting backwards towards another dark age; or it must put a limit, beyond which corporations will not be allowed to expand either in the way of amassing wealth or of extending their operations, which would be almost, if not quite, as injurious to public interests as the first. Men are not going to take much interest in an enterprise that is allowed to go "thus far but no further." They go into new enterprises that hold out the possibilities of great results, but are not willing to risk their capital in enterprises which are limited by law to a moderate return. It seems, therefore, that the prejudice against corporations will, if it is allowed to have its way, almost arrest civilization.

DOES THE TRUST ALTER COMPETITIVE CONDITIONS?

I have known the following view of the subject to be presented: There are fifty manufacturers of plug tobacco, we will suppose, in the United States. The partners in each house receive a support, but a bare support. They all unite and form one great corporation, which issues its stock to each partner according to an arbitrary valuation of the interest of each that they make, and forthwith each of these partners, from being a man of the most limited means, becomes a man of affluence. There must be something wrong, it is claimed, where such a phenomenon as this can be presented, though the increased profits that enrich the partners are merely expenses saved. But how is the public hurt by it? If the "Trust," as the public will insist upon calling such a corporation, reduces the price of the manufactured article to the consumer, as I insist is demonstrated in this essay, what right has the consumer of plug tobacco to complain? It is said, however, that the "Trust" also reduces the price which the grower of tobacco gets for his product. I think it could be shown that this is not so; but I pass that by. Here is something to be thought of, though: there are one hundred users of tobacco, perhaps, where there is one grower of tobacco. All the consumers are interested in getting their tobacco as cheaply as possible. If they secure this result, does it rest with them to complain?

But, it is said, the "Trust" prevents other persons from becoming manufacturers of tobacco. It must be remembered, however, that the only reason the "Trust" was formed was that competition had become so close and destructive that none of those engaged in the business could make more than a bare living. How was a newcomer to open a business against such competition as that? If he attempted it he would be destroyed, for unbridled competition had reduced profits to a point that

would make it impossible for a newcomer to get a footing. But if, as is claimed, the "Trust" charged such prices as to make unreasonable profits, he might stand a chance of opening a business in competition with it. If he competed with the separate firms he was necessarily destroyed. If he competed with the "Trust," he had a chance if it charged unreasonable prices. The new man had no chance, therefore, under old conditions; he might have one under the new. How, then, has the "Trust" interfered with competition more than old conditions interfered with it?

THE TRUST AS RELATED TO THE CONSTITUTION.

The Fourteenth Amendment to the Constitution of the United States provides that no State shall "deprive any person of life, liberty, or property without due process of law," and the Fifth Amendment does the same as to the United States. Does this forbid the United States and the Legislatures of the States to enact statutes that in effect break up the Trusts? To determine this question, we must first determine whether the citizen has a right to enter into one of the partnership agreements that we call a Trust, and if so, whether that right is a "liberty" or property.

The matter of monopolies at common law has already been touched upon. It is stated in many places that the common law condemns monopolies, contracts in restraint of trade and agreements to control articles of "prime necessity," such as food or coal. But there is great confusion of thought involved in this matter. What we know certainly is that in the reign of Queen Elizabeth a practice had grown up for the Crown to grant to favorites an exclusive right to manufacture or vend certain articles. The Queen granted to a courtier the exclusive right to sell playing cards. The English court decided that such a grant was an infringement upon common right, that it was beyond the prerogative of the sovereign to make. When the attempt is made to carry this doctrine beyond the case in which it was announced, error and confusion creep in, notwithstanding the fact that such persistent claim is made, that articles of "prime necessity," as they are called, stand upon a special footing.

What countenance is there for the proposition that the common law, that is our institutions in their essential elements, forbid two or more traders who may be working together jointly for their mutual benefit to secure all they can of any business even to the extent of a practical control of it whether it concerns articles of "prime necessity" or

not? The spirit of our institutions encourages every citizen to labor at his calling, whatever it may be, with his best efforts, and to encourage him thereto, it holds out to him the assurace that he shall have the protection of the law in possessing and enjoying whatever he may accumulate. Those institutions also declare that whatever one man may do others may do jointly. Our institutions therefore, instead of prohibiting encourage the citizens to work together and to secure as much as possible of the line of business that they may be engaged in, even its control, although this control is now called monopoly. Our institutions instead of discouraging monopoly of this sort, when secured by the citizen through his own effort, and not by aid of the sovereign power, the same opportunity being open to all others, actually encourage it, and even if it be in articles of "prime necessity."

Why then shall it be said that the common law opposed this kind of so-called monopoly in articles of "prime necessity" more than in others? Can any one say that the common law forbade a citizen to buy meat or grain and sell it again for a profit. If it allowed one man to do this, did it not equally allow several to do it together in concert, and in any quantity desired by them?

Our institutions in their spirit and nature are under discussion. What courts and writers may have said is put aside now. The common law in its essence is the matter being examined. It has always been the boast that the common law was the perfection of reason. That means, that the common law adapts itself to actual condition and furnishes that principle of rule for those conditions which justice and right reason require. It is true that some conditions have lasted so long that rules of action prescribed for those conditions have been acted on every day until they have become too firmly woven in the general fabric of the law to be discarded, except by act of the legislative power. But in other cases principles have been declared by the authorities of the law which seemed to be called for by justice in the conditions that then existed. But they remained as declared principles only with little or no action based upon them, and in time, as those conditions have changed with the progress of civilization, the authorities of the law have felt themselves at liberty to set the old declaration of principles aside and declare new ones, suited to the new order of things. In the last half of the eighteenth century, that great luminary in the reform of law, Lord Mansfield, set aside old notion after old notion, and absolutely reconstructed England's code of commercial law, so as to cut out of it rules and regulations inspired by an age of rapine and war,

and bring it into harmony with an age of progress and commercial ventures.

The declaration made by courts in old time, that the common law condemned the kind of monopolies we have described, and particularly in articles of "prime necessity," were declarations not of the true principles of the common law but declarations fitting the rule of the people to the conditions of the people, and as they had no steam, electricity and modern machinery to enable restricted competition to pull down any monopoly that trade might erect, the principles declared for that condition are not to be held binding in a totally different condition that neither requires it nor can endure it.

And so we find the English judges in 1891, in the Mogul steamship case, repudiating the whole theory in all its forms and branches. This subject has been fully treated in a preceding part of this essay, but I cannot forbear to add the following remarks :

When is a co-operative arrangement amongst individuals to lose its character of a mercantile partnership and fall into the category of the baneful "Trust?" If it is lawful and just for six men, each having a capital of $100,000, to combine their resources and work together as a mercantile partnership, upon what principle is it to be said that when sixteen men, each having a capital of $1,000,000, combine their resources and work together as a mercantile partnership, their arrangement has become an unlawful and injurious "Trust?" If it is lawful for every individual to do a thing by himself, upon what principle does the act become unlawful when done by two or more individuals acting together?

These are considerations, the force of which I have never been able to avoid, and I candidly confess my utter inability to appreciate the arguments that go to showing that combinations of individuals to do things that each one may lawfully do by himself are unlawful and injurious arrangements.

I am equally unable to appreciate the argument that defines the subject-matter in respect to which there must be no combination. Those who argue that side of the case tell us that the foundation principles of our laws forbid combinations to control traffic in articles which are "staple articles or articles of prime necessity."

It is beyond question that this statement of the case can be found in text-writers and in the opinions of courts, but I have never yet been able to understand the rationale of it. If men may lawfully combine their efforts and their capital for the purpose of trading, I cannot see

how the line at which combinations may be lawfully made, and at which they are forbidden, is to be fixed upon any such basis. What is a "staple article," and what is an article of "prime necessity?" Is wheat a "staple article" and one of "prime necessity?" There are hundreds of millions of men in the world who never eat a mouthful of wheat bread, and even in this country hundreds of thousands eat corn bread more than wheat bread. In the East great masses of population live on rice; but is rice to be considered a "staple article" and one of "prime necessity" in the United States, in respect to the purchase and sale of which there shall be no co-operative labor?

The truth is, there is hardly an article of merchandise that can be mentioned that is used by all mankind, while every article that can be named is used by some part of mankind. What is "staple" and of "prime necessity" to some is to others a matter of indifference. The true philosophy of the matter seems to be that the legislator has nothing to do with the subject. Men are to be left free to do as they please with their own, and then the all-prevalent desire to make money will cause them to sell whatever they have at the lowest price that will bring a profit, because the cheaper they sell the more they will sell, and profits come from great sales at small profits rather than small sales at great profits.

THE FOURTEENTH AMENDMENT.

If the line of argument that has so far been pursued be sound, then it is proved that by the original and essential principles of our institutions it is every citizen's natural and inherent right to buy and sell any article of merchandise, whether one of "prime necessity" or not, and in any quantity that may suit him, and it is his further right to join with his fellow-citizens in so doing. It is further proved that there is no limitation upon these rights except the mandate of the law that neither one citizen when acting by himself, nor a number when acting together, shall exercise their rights with the malicious purpose of inflicting an injury upon others. These, then, are of those unalienable rights that our Declaration of Independence says men have. They are the foundation rights of citizenship.

A number of the States have passed acts which undertake to forbid the people to dispose of their property according to their own will and choice when they do it according to methods which the Legislatures of those States think would result in monopolies or in restraint of trade. But this is against the right of the citizen, as has been shown, and such

an act by a State Legislature deprives him of his property without due process of law. An Illinois statute forbade laborers to hire themselves out for more than eight hours a day. The Supreme Court of that State decided that the laborer's right to sell his labor was his property, and that such a statute deprived him of his property without due process of law, and was repugnant to the Constitution. *Ritchie* v. *People*, 155 Ill. 98 ; *Allgeyer* v. *Louisiana*, 165 U. S. 578.

The trader's right is to sell his goods without molestation if his purpose be to benefit himself, and a statute that forbids him to do this deprives him also of his property. See opinion of Mr. Justice Field, 111 U. S. R. 757 ; see also U. S. Judge Swayne's decision on the Texas Anti-Trust law.

One of the New York statutes, under which the directors of the American Tobacco Company are being prosecuted, forbids two or more persons to agree together to do any act injurious to trade or commerce, and the New York judge rules that when these gentlemen say to a jobber that he shall not sell their goods unless he agrees to sell their goods only, and at their price, they coerce the jobber and thereby restrain tade. But the defendants had a right to have the judge say that there was no unlawful coercion unless the directors were animated by an evil mind. They had a right to coerce the jobber by moral coercion when profit alone was their object, and when he failed to say this he gave an effect to the State law which deprived them of their property, the property being the right to sell their goods upon any terms that suited them, and by any lawful methods, so long as their intention was good and no malice existed towards any one.

Another act of the New York Legislature provides that if officers of a corporation enter into a combination to restrain or prevent competition in the supply or price of any article or commodity in common use, or with intent to restrict or restrain commerce in the State, they shall be prosecuted. But this act ignores the intent also. It undertakes to forbid the citizen to sell his goods for the best obtainable price, although his intention is solely to benefit himself, and it thereby abridges his "liberty" and deprives him of his property.

Vice-Chancellor Malins, of England, said, in the case of *Dixon* v. *Holden*, L. R., 7 Equity Cases, 490 : "One man has property in lands, another in goods, another in business, another in skill, another in reputation; and whatever may have the effect of destroying property in any one of these things (even in a man's good name) is, in my opinion, destroying property of a most valuable description. Now, the business

of a merchant is about the most valuable property he can have. Here it is the source of his fortune, and, therefore, to be injured in his business is to be injured in his property."

Adam Smith, in his "Wealth of Nations" (book I, ch. 10), lays down doctrines of exactly similar character in speaking of the property a man possesses in his ability to work and thereby acquire property.

The value of a business as property can be illustrated with the New York *Herald*. That is supposed to have an income of more than a million dollars, but its visible property is of comparatively small value. If the *Herald*, without a piece of its property, were offered at auction it would sell for several million dollars. All this immense property is in its business; the result of years of labor and the expenditure of money. Is it to be said that its intangible power of earning income is not property?

WORKINGMEN.

These are the rights of the trader which the Fifth and Fourteenth Amendments protect. But if they protect the trader they protect the workingman also, and if the Legislatures of the States can enact valid statutes like those of New York against the trader, they can also enact valid statutes in depriving the workingmen of their right to associate themselves into trade unions. But if the test of every association is the intention with which it is formed, the right to form trades unions is a "liberty" within the protection of the amendment so long as the intention of those forming it is to better their own condition only. The workingman is, therefore, as deeply interested as the trader to see the doctrines of this essay prevail. With them his unions have the protection of the Constitution of the United States; without them they may be forbidden by the State Legislatures.

IT IS WAR ON CAPITAL.

The clamor against Trusts is at bottom a war upon capital. Capital finds itself compelled to form combinations to protect itself against destructive competition, and it also finds that when separate interests are combined it can introduce all sorts of accessories in administration that the separated industries cannot have. The clamor against Trusts is an endeavor to force capital to submit to destroying competition, and to abandon the economical methods of doing business.

Freedom to capital to protect itself in every way in business and to save expense by every possible economy is just as necessary to the public as it is to the capitalist. When the capitalist is thus conceded the

right, inhering in all Americans, business runs along smoothly, it is ever on the increase, and consumers get the advantage of every reduction in price that improved machinery and improved methods entail.

In an article in the *North American Review* several years back, Mr. Henry George pictured a deplorable condition of the miners in Pennsylvania. The inference he undertook to convey was that the Government should force the employing capitalists to deal better by these miners. The effect of such Governmental interference would be the refusal of the capitalists to mine upon any terms. The war upon Trusts is driving elsewhere people who have money invested in them, railroad mortgage bonds being especially in demand, but the railroads cannot earn the interest if manufactories and other industries are crippled or broken down. The unreasonableness of all this clamor against the Trust was demonstrated by the result of the Lexow Committee investigation of the Sugar Trust which shows that the difference between the price for raw, unrefined sugar and refined sugar is from three-quarters to seven-eighths of a cent a pound. How can we expect producer and consumer to be brought any closer together than this? How can it be said that the public is being robbed? The Government tax upon sugar is one cent a pound, and yet the refineries turn the undesirable raw stuff into a choice staple for less than the tax imposed by the Government. Furthermore one of the strongest claims of the Trust is that its operations tend to the advantage of the working people by giving them constant employment, while the old separate industries were frequently idle at certain seasons.

When the argument against the Trust is reduced to its ultimate analysis, candid men will have little difficulty in reaching the conclusion that it is largely inspired by envy. Men who do not prosper envy the prosperous.

CONCLUSION.

In the Trans-Missouri freight case the Supreme Court of the United States has said, in effect, that as the anti-trust act of Congress makes "every" agreement which puts any *restrictions* upon trade void, it must hold every such one to be void. I submit that there is a vice in the court's argument, and that the vice is in confounding restrictions upon trade with the legal idea of "restraints upon trade."

It does not follow because an agreement between men may put restrictions upon some sort of traffic somewhere that such agreements must necessarily operate as "restraints upon trade." Upon the contrary, they may operate as the greatest possible promoters of trade.

Take the case put in the early part of this essay of a partnership contract between two citizens of Virginia to ship tobacco to New York, in which each binds the other not to deal in corn, wheat, or lumber, but to give his whole time and attention to the business of shipping tobacco. This puts restrictions upon trade by preventing either of these parties from dealing in corn, wheat, or lumber. Nevertheless, the agreement is one which will have the healthiest and most beneficial effect possible upon trade. It makes these two men specialists in the tobacco-shipping business and tends to encouraging them to develop the business to its utmost possible limits.

It is not possible to have trade without restrictions of some sort upon some sort of trade. Trade is nothing but a vast aggregation of contracts, and contracts necessarily involve restrictions. The very life of a contract is that the contractor shall do nothing that is inconsistent with that which he agrees to do. The contract binds the contractor, therefore, that he will not engage in that sort of traffic which will nullify what he has undertaken to do, and it operates, therefore, as a restriction upon trade to that extent. Considered broadly, therefore, restrictions upon trade are essential to the life of trade. There can be no trade without them. The test of what is and what is not a "restraint upon trade" must, therefore, be found somewhere else than at bare restrictions upon trade. What is that point?

It is found at the dividing line between Liberty and License. License is freedom to do what one will without regard to the rights of others. It is the autocrat's function. Liberty is freedom restrained by law—that is, the right to do what one will with his own so long as he does not trespass upon the rights of another and he leaves that other full opportunity to do what he will with his. The Czar of Russia has license, Queen Victoria has liberty. Whilst that stands as the guiding principle, men are left in full enjoyment of their natural liberty. Every man makes for himself the most that is possible because he has full and free opportunity to use his talents, his energies, and his material resources to the very best possible advantage. That is the contract the citizen may make. The coutract he may not make is the one which is not iuspired by the desire and purpose to improve his own condition but by the devilish one of trying to make another man and his family beggars because he hates them. The one class of contracts, though involving restrictions of certain sorts upon trade, really promotes trade by inspiring every man to do his best to spread trade out into the greatest volume it can attain to. The other really restrains trade because

it is the act of a pirate, whose philosophy makes him *hostis humani generis*. He is a restrainer of trade because he would prey upon it and make it his sport and jest, and thereby destroy it. That is the only restriction which restrains, in the true sense of restraint. But whilst those engaged in trade have no evil intentions towards others, their agreements promote trade, even though imposing restrictions of some sorts, somewhere, on some kinds of trade.

The plea upon which it is claimed that this should not be the rule of life takes cognizance only of helpless citizens that are to be protected from the injurious actions of their robust fellow-citizens, who are exerting all their powers of mind and body to push their fortunes along. But that is the way to grow a dependent and enervated race. The way to grow a self-reliant and progressive race is to throw all citizens upon their own resources and allow each to make every possible use of his faculties of mind and body that he can make while pursuing his own good only.

Mrs. Battle said upon taking her seat at the whist table: "Now for a clean hearth, a bright fire, and the rigor of the game." That is what, and only what, the self-reliant citizen asks in trade. He neither asks favors nor gives favors. All that he asks is an open field, a fair fight, and the "rigor of the game." He who cannot survive in that contest must perish. Liberty of thought and action are not to be denied to the capable and the resolute because the weaklings are not equal to keeping up with their speed. That is the law of life, and when we accept it we bring the greatest good to the greatest number. When we reject it we interfere with the due course of nature and produce discord and the beginning of decay.

The Supreme Court's decision has now brought us in this country in the progress of our civilization to the parting of the ways. If we take the road pointed out to us by the principle of the Mogul steamship case we shall go on in the development of our institutions upon the lines of democratic freedom of thought and action.

If we take the other, we shall fall under Populistic leadership and march steadily forward to the tutelage of a paternal government that will gradually spread out into a broad scheme of Socialism, where all aim at living upon the Government, and those live best who are the laziest but the most skilled in thimble-rigging.

And now, with these closing remarks, I bring to an end this essay, which covers no great space, though it has cost me months and years of patient thought and investigation. With entire confidence in the soundness of its propositions and distrustful only of the manner in which I have presented them, I submit my little work to the intelligent judgment of my fellow-citizens.

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